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FILED IN COURT
Sept 10 1979
JAMES N. CORBETT, Clerk
B Domingues
Deputy

CR-00284

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,)
Plaintiff,)
vs.)
IGNACIO A. ORTIZ,)
Defendant.)

NO. CR-00284

RESPONSE TO DEFENDANT'S MOTION FOR BILL OF PARTICULARS AND MEMORANDUM ON DEATH PENALTY

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his deputies, KENNETH J. PEASLEY and ELIZABETH C. PEASLEY, and respectfully submits the following response to the defendant's motion for bill of particulars and memorandum in support of the State's request that the penalty of death be imposed in this case.

Respectfully submitted this 10th day of Sept, 1979.

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Kenneth J. Peasley
Deputy County Attorney

Elizabeth C. Peasley
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MEMORANDUM

In the present case the defendant, Ignacio Ortiz, has been convicted of eight separate felony counts. This response and memorandum is directed towards the defendant's conviction of first degree murder. The testimony at trial revealed that the defendant was having a sexual affair with the victim, Manuelita McCormack. On the night in question, the defendant went to the victim's house, taking with him a can of gas and a hunting knife.

The defendant entered the residence, had words with Manuelita McCormack, strangled her, stabbed her in and about the neck area, doused her body with gasoline, stabbed two little girls and then set the house on fire with Patricia McCormack, Bernice McCormack and little Charlie McCormack still inside the residence.

The State hereby indicates its intent to seek the penalty of death.

In its motion for bill of particulars the defendant requests that he be noticed concerning what aggravating circumstances the State intends to produce evidence on. Initially, the State would point out that a no bond hearing was held in this case at which time the State indicated what, among others, aggravating circumstances existed to justify holding the defendant without bond.

Additionally, the State does not feel that it is obliged to enumerate further those aggravating circumstances upon which it will present evidence. Nevertheless, the State will indicate at this time that it intends to present evidence on those aggravating circumstances which are enumerated and discussed in A.R.S. §13-703 (F)(3)(6). The State does not intend to be limited to those factors, however, a review of the applicable statute indicates that those factors may in fact be the only ones which exist.

Pursuant to A.R.S. §13-703 (C), the State respectfully requests this Court to consider the evidence and testimony admitted at trial insofar as such evidence and testimony relates

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to the existence of aggravating circumstances set forth in A.R.S. §13-703(F)(3)(6).

The statute clearly points out that once this evidence had been admitted at trial it need not be introduced at the time of the sentencing proceedings, including hearings on aggravation and mitigation.

The State also respectfully urges this Court to make a factual finding that the murder of Manuelita McCormack was committed by the defendant, Ignacio A. Ortiz, in a cold, calculate and premeditated design. The State requests this Court to further find that Manuelita McComack's death was intended by the defendant Ignacio Ortiz prior to the actual killing. That is, that the defendant specifically intended to kill Manuelita McCormack at the time that he arrived at the residence on the night in question.

Arizona's death penalty statute has been recently addressed by the Arizona Supreme Court in the case of State v. Watson, 120 AZ. 441, 586 P.2d 1253 (1978). In this case, the Arizona Supreme Court, following the mandates of Lockett v. Ohio, 57 L.Ed.2d 973 (1978), declared unconstitutional that portion of the Arizona's death penalty statute which limited the number and kind of mitigating circumstances that could be presented by the defendant in order to avoid the death penalty.

The present Arizona death penalty statute, as interpreted by Watson , provides that the defendant may introduce any number or kind of mitigating circumstances in order to avoid the imposition of the death penalty. The statute is otherwise constitutional.

With respect to the aggravating circumstance discusse under A.R.S. §13-703(F)(3), the State would initially call the Court's attention to State v. Watson, supra. In Watson, the defendant and others were burglarizing a residence. While in the residence, the defendant went upstairs, and while upstairs, the owner of the home, the victim, obtained his gun and began shootin at the co-defendant. The defendant came back downstairs and shot

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the victim in the back four times, the last time while the victim was face down on the floor. The Court noted that although the killing was shocking, it was not in a particular heinous, cruel or depraved manner as contemplated by the statute. In Watson the Court was also asked to determine whether the offense was committed by the defendant creating "a grave risk of death to another . . .". The Court noted at the time of the shooting, both the victim's wife and daughter had left the residence. This aggravating circumstance was therefore not shown as no one else was present. (Emphasis added)

In State v. Doss, 116 AZ. 156, 568 P.2d 1054 (1977), the defendant, after a brief argument with the victim, drove to his home, got his revolver, returned to the college where the victim was and sought the victim out. He found the victim in the college gymnasium which was crowded with students registering for classes. The defendant came up to the victim from behind and emptied his revolver at him, killing the victim and wounding a student standing thereby. The Court found the existence of the aggravating circumstance that states that during the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense, in that the defendant shot the victim in a place crowded with college students and one of the students was indeed wounded by one of the shots.

In State v. Ceja, 115 Ariz. 413, 565 P.2d 1274 (1977), the defendant went to the decedent's home with the intent of "ripping-off" his drugs. When he arrived, the deceased's wife was home alone and she resisted him in his attempt to take the drugs. The defendant shot her twice while in the living room, dragged her into the bedroom and there shot her again several times, emptying his gun to "finish her off." Either while shooti the wife in the bedroom or soon thereafter, the deceased drove up to the house. When the deceased came in, the defendant ordered him at gunpoint to go innto the bedroom where the deceased was th

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shot. He had been shot twice in the front and twice in the back. In addition, numerous abrasions were found around his face, which were caused by kicks by the defendant subsequent to the shooting. The court held that the defendant did not create a grave risk of death to the deceased in the commission of the offense against the deceased's wife because the evidence indicated that the deceased did not drive up to the house until the defendant had dragged the deceased's wife into the bedroom and shot her again. There was no evidence presented which tended to demonstrate that the defendant, in killing the deceased's wife created a grave risk of death to the deceased.

The court then went on to discuss whether the offense had been committed in an especially heinous, cruel or depraved manner. Citing State v. Blazak, 114 Ariz. 186, 560 P.2d 54 (1977) the court held that "the defendant's conduct in continuing his barrage of violence, inflicting wounds and abusing his victims, beyond the point necessary to fulfill his plan to steal, beyond even the point necessary to kill, was such an additional circumstance of a cruel and depraved nature so as to set it apart from the usual or the norm." The court based its holding on the following conduct of the defendant: the defendant initially shot the deceased's wife twice in the chest, dragged her into another room and shot her four more times in the head, for no apparent reason; then later, after the deceased had been shot and fallen to the floor, the defendant shot him in the back and kicked him in the face repeatedly, again for no apparent reason. The court quoted with approval the meaning of the terms "heinous, cruel or depraved" as stated in State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977):

> "The words 'heinous, cruel or depraved' have meanings that are clear to a person of average intelligence and understanding. Webster's Third New International Dictionary defines them as follows:
>
> 'heinous: hatefully or shockinly evil: grossly bad.

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'cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic.

'depraved: marked by debasement, corruption, perversion or deterioration."

The court noted that it was this type of killing involving the additional circumstances of the nature noted above which set the crime apart from the usual or the norm, and which justified the imposition of the death penalty. It was this additional violence, over and above that which was necessary to carry out the defendant's criminal intent, that in effect distinguishes this murder from the "usual or the norm" of first degree murders.

In State v. Holsinger, 115 Ariz. 89, 563 P.2d 888 (1977), the defendant solicited the assistance of two other individuals to murder a certain doctor. When these two other individuals were to commit the murder, they only wounded the doctor but did end up killing the doctor's housekeeper. The court here found that in the commission of the offense, i.e., the attempted murder of the doctor, the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense, i.e., the housekeeper. The court in this case did not further explain its reasoning for its finding that this aggravating circumstance existed.

With respect to that aggravating circumstance discussed in A.R.S. §13-703(F)(6), the State would first call the Court's attention to State v. Bishop, 118 Ariz. 263, 576 P.2d 122 (1978). Obviously, this aggravating circumstance has to do with whether or not the offense was committed in an especially cruel, depraved and heinous manner. In Bishop, the defendant had struck the victim between two and four times with a hammer; immediately and systematically removed the victim's shoes, his wallet and money; hogtied the victim's legs, dragged him to a mine shaft and returned shortly thereafter to drop rocks and dirt on the victim, who lay struggling at the bottom of the hole. The Court found that the offense had been committed in an especially heinous,

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cruel and depraved manner.

In State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), the defendant went into a room where his two infant daughters were sleeping, poured Coleman fuel, in great quantities, around the room, stood in the doorway and threw a lighted match into the room, then returned to his bed to lie down while the children burned and died. The autopsy revealed that the cause of death was not just carbon monoxide poisoning, the blood level of which was very low, but also incineration. The court noted that it could not think of a more ghastly death than this for anyone, and that this falls squarely within the meaning of "heinous, cruel and depraved."

Obviously, the similarity between the facts in Knapp, and the facts in the case presently before the Court are striking. The pathologist testified that although it was his opinion that Manuelita McCormack was dead at the time of the fire, it was medically possible that she was alive. Dr. Hirsh stated those circumstances which would support such a medical theory. Importantly, other testimony indicated that Manuelita McCormack had cried out "don't hurt baby Charlie". This would certainly indicate that she was alive after the time that she had been strangled and stabbed inasmuch as her reference to only baby Charlie would suggest that Patricia and Bernice had already been stabbed. It is clear from the evidence that Patricia and Bernice were stabbed after Manuelita McCormack.

All of this supports the State's theory that Manuelita McCormack was alive at the time her body was doused with gasoline and the house was set on fire. Knapp, demands that the death penalty be imposed in this case.

The State would also call the Court's attention to the case of State v. Blazak, 114 Ariz. 186, 560 P.2d 54 (1977), wherein the sentencing judge found that the crime had been committed in an especially cruel and depraved manner and that during the commission of the offense the defendant created a grave

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risk of death to others than the victim.

In Blazak, the defendant had entered a bar and demanded money from the bartender. When the bartender refused to comply, the defendant shot him four times. He then shot two more individuals, patrons of the bar, killing one. Significant in the court's decision that the aggravating circumstances relating to an especially cruel and depraved manner of death was the fact that defendant's conduct went far beyond that which was necessary to effectuate his criminal scheme. The defendant entered the bar intending to rob it. When the bartender refused to cooperate, the defendant shot him. The defendant did not stop there, but rather continued to shoot him. The defendant coldly murdered two persons for absolutely no reason; the murder of the bar patron was, according to the Knapp Court, particularly unnecessary and consciousless. It was this additional violence, over and above that which was necessary to carry out the defendant's criminal intent that distinguishes these murders from the "usual or norm" of first degree murders.

The Court also noted that there was no resistance by the bartender or any of the other people in the bar, and that there was no justification in any manner for the actions which resulted in the killings. In this sense, the defendant committed the offense in an especially cruel and depraved manner. In addition, the Court found that during the commission of the offense, the defendant knowingly created a grave risk of death to other persons in addition to the victim of the offense in that in addition to the two persons that were killed, there was an injury to another person in the bar and there was risk of injury to several others.

In Alvord v. State, 322 So. 2d 533 Fla. (1975), three murders were committed while the defendant was engaged in the commission of the felony offense of burglary. Each of these murders was especially heinous, atrocious and cruel in that the homicides were committed through strangulation by use of a rope. The court stated that this could only be accomplished by a cold,

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calculated design to kill, as distinguished from a single shot from a firearm during an outburst of anger. The Alvord court also found that the defendant, in the commission of the offense, created a great risk of serious bodily harm by death to other persons in that the defendant obviously murdered two of the victims in order to avoid a surviving witness to the murder of the other victim. The court also noted that these murders were not committed under circumstances which the defendant believed provided a moral justification or extenuation for his conduct in his capacity to conform his conduct to the requirements of law was not impaired.

In Hoy v. State, 353 So.2d 826 (1978), the court in sentencing the defendant to death, seems to have considered the fact that the defendant had inflicted severe mental distress upon the victims before killing them. In Hoy, the defendant and his partner approached the victim's car, with gun in hand, and told the victims that the defendant wanted to have intercourse with the female. The victims were removed from a beach area where they had been sitting, to a secluded area, where the defendant overcame the girl's resistance and sexually assaulted her in the presence of her boyfriend. The boyfriend attempted to go to the girl's aid and was shot in the face. After falling to the ground he was shot twice more in the head. The female was then sexually assaulted by the defendant's partner and then shot twice in the side of her head. She was then again sexually assaulted, rolled over and then shot in the forehead. The court determined that these offenses were committed in especially heinous, atrocious, and cruel manner stating:

> "The capital felony was especially heinous, atrocious and cruel in that two attractive, vibrant teen-age youngsters in love with life and in love with each other were killed in cold blood in each others presence deliberately and mercilessly. The girl was raped in the presence of her fiance, and he was killed when he tried to help her. She had to know, as she was being violated, and begging for help, that she too would die at the hands of her merciless ravishers--as she did die."

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The case of Washington v. State, 362 So.2d 658 (1978), also indicates what is sufficient aggravating circumstance to call for the death penalty. Washington involved three separate series of events. The defendant, in attempting to burglarize a residence, came upon the owner of the home and her three sisters-in-law together in one room. At this time he instructed them to lie on the floor permitting the owner to enter the kitchen and get some money. At this point, the defendant cut the telephone cord and tied up the four women. The defendant then shot the owner and repeatedly stabbed her with his knife, causing her death. He then shot each of the others in the head and inflicted several stab wounds. Each of the sisters-in-law survived the assault. In regards to this incident, the court stated:

> [4] Katrina Sirk was the victim of a calculated robbery which resulted in her murder. She was stabbed repeatedly and was also shot in the head. The bullet did not penetrate her skull and the cause of death was four of the nine stab wounds, none of which was instantly fatal. She was murdered in her own home in the presence of her three sisters-in-law who were later shot in the head and stabbed. The atrocity of the episode cannot be gainsaid."

The next series of events when the defendant and another enter a home with the intent to kill the owner. Upon finding the owner, the defendant's accomplice covered the owner's face with a pillow and held him helpless, while the defendant stabbed the victim to death. In holding that this offense was committed in an especially heinous, atrocious or cruel manner, the court stated:

> "The victim Pridgen was stabbed repeatedly while appellant's accomplice held him helpless and unable to defend himself. Pridgen received seven potentially fatal wounds, none of which could have caused instantaneous death. Dr. Fernandez testified that it would have taken minutes for the victim to die and Washington's confession established that Pridgen was struggling, wiggling, and trying to cry out. His face was covered with a pillow to mute the cries of pain and anguish

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which attend such a ferocious stabbing attack."

In the third series of events, the defendant and others forcibly bound their victim to a bed, spread eagle, and the defendant then stabbed the victim to death. Holding these actions to be especially cruel, heinous or atrocious, the court stated:

> "The murder was effected while Meli was tied spread-eagled on a bed with no ability to resist. Once again an accomplice covered the victim's face with a pillow to stifle his outcry from receiving multiple stab wounds. That Meli was alive during the course of the attack is borne out by the testimony of Dr. Wright who related that although one of the stab wounds could have caused near instantaneous death, while each wound was delivered Meli had blood pressure capable of producing hemorrhage, indicating that life continued."

The court in Washington was faced with these three fact situations in which the victims were initially rendered helpless before being murdered. It seems that the fact that the offense was committed after placing the victim in a helpless situation is important in determining whether or not the imposition of the death penalty is appropriate.

In the present case, the State submits that many of the circumstances discussed in the cases above were certainly present.

The aggravating circumstance of creating grave risk of death to a person other than the victim is present inasmuch as Mr. Ortiz went to the house with the calculated intent to kill Manuelita McCormack. He brought gasoline with him and a hunting knife to accomplish the stabbing. It simply cannot be said that Mr. Ortiz did not create a grave risk of death to little Patricia, Bernice and Charlie during the commission of the offense that he intended prior to his arrival. In fact, Patricia and Bernice were both stabbed. In fact, all three children were in the house when

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Mr. Ortiz set it afire.

Additionally, if one believes, as the State does, that Manuelita McCormack was alive at the time the fire was set, then it is clear that the homicide by fire clearly created a grave risk of death to these three children, inasmuch as they were, effectively, trapped in two separate rooms of the house. The testimony of the arson experts clearly establishes this fact.

The question of whether or not the offense was committed in an especially cruel and heinous manner can be answered by reference to the facts which show that Mr. Ortiz strangled Manuelita McCormack, stabbed her more than once in the throat area and then set her body afire. Although Dr. Hirsh testified that in his opinion she was dead at the time of the fire, there is evidence to the contrary. Dr. Hirsh himself indicated that it was medically possible that Manuelita McCormack was alive. If in fact she was alive there can be no more cruel and heinous manner of inflicting death than to douse the body with gasoline and then burn it. Certainly the fact that the victim, Manuelita McCormack, was placed in the position of watching her two daughters being stabbed and having concern over her son, Charlie, also supports the conclusion that the homicide was committed in an especially cruel, heinous and depraved manner. If one concludes that Manuelita McCormack was alive at the time of the fire one must necessarily conclude that the defendant during the commission of the offense created a grave risk of death to other persons, namely the children. If one concludes that Manuelita McCormack was dead at the time of the fire one must reach the same conclusion for the reason that the defendant intended upon his arrival to commit the offense and the manner in which he committed the offense created such a risk to the children of Manuelita McCormack.

Also, the violence inflicted upon the three McCormack children after Mr. Ortiz had assaulted and ultimately killed Manuelita McCormack, was above and beyond that which was necessary

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to accomplish his intended purpose, that is, the killing of Manuelita McCormack. It is this kind of unnecessary violence that has been viewed by the Court as sufficient to warrant the imposition of the death penalty.

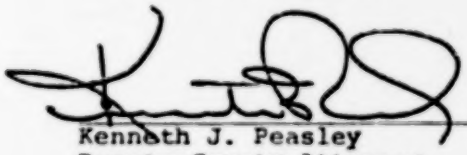
The State, therefore, respectfully submits that aggravating circumstances under A.R.S. §13-703(F)(3) and (6) exists and have been proved beyond a reasonable doubt.

Additionally, the State submits that there is no mitigation, let alone mitigation sufficiently substantial to call for leniency.

Therefore, the State on behalf of Manuelita McCormack, her children and the community, respectfully urges this Court to impose the penalty of death upon Ignacio A. Ortiz.

Respectfully submitted this 10th day of September, 1979.

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PIMA COUNTY ATTORNEY



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Deputy County Attorney

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. IGNACIO A. ORTIZ, Defendant.	No. CR-00284 MORE DEFINITE STATEMENT RE: DEATH PENALTY REQUEST - AGGRAVATING CIRCUMSTANCES

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his Deputies, KENNETH J. PEASLEY, and ELIZABETH C. PEASLEY, and hereby makes the following more definite statement with respect to the State's request that the death penalty be imposed in this case on the Defendant IGNACIO A. ORTIZ.

Respectfully submitted this 12th day of September, 1979.

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MORE DEFINITE STATEMENT

The Defendant has been convicted of First Degree Murder in cause number CR-00284.

Pursuant to A.R.S. § 13-703, the Defendant is subject to and the State is hereby asking for the imposition of the death penalty.

In order to justify the imposition of the death penalty, the State must prove the existence of at least one of those aggravating circumstances which are set forth at A.R.S. § 13-703(F).

The State hereby declares its intent to prove the existence of those circumstances set forth in § 13-703(F)(3) and (

A.R.S. § 13-703(F)(3) provides that:

> "In the commission of the offense, the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense."

The State hereby indicates that it intends to establish that the Defendant, in the commission of the offense, knowingly created a grave risk of death to Patricia McCormack, Bernice McCormack and Charlie McCormack, III.

A.R.S. § 13-703(F)(6) provides that:

> "The defendant committed the offense in an especially heinous, cruel or depraved manner."

The State will rely upon evidence presented at trial. In addition, the State may introduce any matter or item which was disclosed in CR-00284 or CR-00767, whether or not such evidence was introduced at trial, including but not limited to the photographs of Manuelita McCormack's body. As any new evidence, testimony or witnesses become known to the State, such will be made available immediately to defense counsel.

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Respectfully submitted this ____ day of September, 1979.

STEPHEN D. NEELY
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Kenneth J. Peasley
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CR-00284

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Plaintiff, vs. IGNACIO A. ORTIZ, Defendant.	No. CR-00284; CR-00767 ADDITIONAL MATTERS PERTAINING TO STATE'S MORE DEFINITE STATEMENT CONCERNING THE DEATH PENALTY

COMES NOW the State of Arizona, by and through the Pima County Attorney, STEPHEN D. NEELY, and his Deputies, KENNETH J. PEASLEY, and ELIZABETH C. PEASLEY, and respectfully submit the following supplemental more definite statement setting forth factors, in addition to those contained in the original more definite statement, which will be relied upon and presented by the State in seeking the imposition of the death penalty.

Respectfully submitted this 2nd day of October, 1979.

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MEMORANDUM OF POINTS AND AUTHORITIES

The State at this time would notice the Defendant that the State will also attempt to show that aggravating circumstances exist under A.R.S. § 13-703(F)(1) which reads as follows:

> "The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable."

Obviously, the Defendant in this case suffered a conviction for Conspiracy to Commit First Degree Murder. This offense is punishable by life imprisonment. Therefore, the State will introduce evidence of the Defendant's conviction for the charge of Conspiracy to Commit First Degree Murder in order to establish an aggravating circumstance under § 13-703(F)(1) in order to justify the imposition of the death penalty.

The State will rely upon those other factors already set forth in the State's more definite statement filed previously.

Additionally, the State would at this time indicate more particularly that it will rely upon evidence and testimony presented at a no bond hearing in this case under Justice of the Peace Court Number IC-5758, which hearing was had on December 26, 27 and 28, 1978 before the Honorable Jack G. Marks, sitting as magistrate.

Additionally, the State will rely upon and offer the testimony of witnesses who testified in the trial of MARY FRANCES ORTIZ under Cause Number CR-00767, including the testimony of MARY FRANCES ORTIZ.

The State will offer the testimony of MRS. ORTIZ as aggravation in Counts Two through Eight in Cause Number CR-00284, in Cause Number CR-00767, and as rebuttal to any mitigation presented by the Defendant with respect to the

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792-8411

Defendant's conviction for First Degree Murder in Cause Number CR-00284.

Additionally, the State may call as a witness Cynthia J. Ginnetti, P.H.D., whose report is attached hereto, or offer said report concerning Counts Two through Eight in Cause Number CR-00284, in Cause Number CR-00767 and as rebuttal to any mitigation presented by the Defendant with respect to his conviction for First Degree Murder in Cause Number CR-00284. The State may also offer the report prepared by Dr. Ginetti, a copy of which is attached hereto. This would be pursuant to the reasoning above.

The evidence and testimony eluded to above, as well as any and all evidence, testimony or exhibits under Cause Number CR-00284 or CR-00767, with respect to the Defendants IGNACIO A. ORTIZ and MARY FRANCES ORTIZ, whether said evidence, testimony or exhibits have been offered or admitted into evidence in either trial or hearings pursuant to said Cause Numbers, will be utilized by the State of Arizona insofar as it is necessary in order to establish the aggravating circumstances set forth in the State's more definite statement and supplemental more definite statement and/or in rebuttal to any mitigation presented by the Defendant.

Respectfully submitted this 2nd day of October, 1979.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STATE OF ARIZONA, Plaintiff, v. IGNACIO A. ORTIZ, Defendant.	No. CR-00284 DEFENDANT'S MEMORANDUM ON AGGRAVATING CIRCUMSTANCES

The State claims in its Memorandum on Death Penalty and More Definite Statement that IGNACIO ORTIZ should be killed because the murder of which he was convicted was committed in an especially heinous, cruel, or depraved manner and because in the commission of the murder of which he was convicted he knowingly created a grave risk of death to other people.

Within its Memorandum, the State has included statements such as, "The pathologist testified that although it was his opinion that Manuelita McCormack was dead at the time of the fire, it was medically possible that she was alive." Memorandum at 6. Because of this and other similar statements made by the State, it is necessary to establish by what burden of proof, the State is required to establish the statutory aggravating circumstances.

There can be no doubt that the State must prove the aggravating circumstances upon which it relies beyond a reasonable doubt. In Florida, with a statute virtually identical to Arizona, the Supreme Court has ruled that the aggravating circumstances must be proved beyond a reasonable doubt. Alvord v. State, 322 So. 2d 533 (Fla. 1975). Likewise, in State v. Simants, 197 Neb. 549, 250 N.W. 2d 881 (1977), cert. denied, 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, the Nebraska Supreme Court ruled that the State must prove aggravation beyond a reasonable doubt. Accord, e.g., Waye v. Commonwealth,

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251 S.E. 2d 202 (Va. 1979). Thus, in determining whether there are sufficient aggravating circumstances to justify the extermination of a human life, it is not sufficient for the Court to find that there may be some evidence to establish the circumstances alleged. Rather, the evidence must prove beyond a reasonable doubt that, with reference to this case, the murder was especially heinous, cruel, or depraved and that other persons' lives were gravely endangered by the commission of the murder.

Is there sufficient evidence to prove beyond a reasonable doubt that the murder was committed in an especially cruel, heinous, or depraved manner? In its review of various cases (many of which do not appear relevant to the facts in this case), the State has failed to consider State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849 (1977). In Stewart, the Nebraska Supreme Court was confronted with facts which were quite similar to those in the instant case. In Stewart, the Defendant met two other people in a van to discuss a marijuana transaction; he had brought a gun and a gasoline can in case the meeting did not progress well. Ultimately the defendant shot both people in the back of the head. He then poured gasoline around the van and ignited it. One of his victims died instantaneously from the gunshot. The other victim survived and escaped from the fire.

One of the aggravating circumstances justifying the imposition of the death penalty in Nebraska is:

> "'The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence.'" 250 N.W. 2d at 861.

The trial judge found that the crime was especially heinous. 250 N.W. 2d at 864. The Supreme Court of Nebraska reversed that finding and concluded that that circumstance "was not proved beyond a reasonable doubt, and should not be applied."

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Id. The Court ruled that, because one could reasonably conclude that the victim died before the fire was started and that therefore the fire was not set for the purpose of causing further harm to the victim, imposition of the death penalty could not lawfully rest upon that justification.

In the instant case, one could also reasonably conclude that Manuelita McCormick died before the fire started. That, in fact, was the conclusion reached by Dr. Louis Hirsch, the State's pathologist, after conducting an autopsy and reviewing the scientific evidence. Likewise, as in Stewart, one can reasonably conclude that the fire was not set for the purpose of causing further harm to the victim, nor did it, in fact, inflict additional suffering on the victim. Therefore, this murder was not committed in an especially heinous, cruel or depraved manner.

The State appears to claim, nevertheless, that the murder was especially heinous, cruel or depraved for three reasons: first, because the victim was stabbed more than once; second, because the body of the victim was burned by the fire; and third, because, the State speculates, the victim saw Defendant stab her daughters before she died. The latter two reasons are not supported by the evidence. The first reason is not substantiated by the case law.

The evidence introduced at the trial suggested that Manuelita McCormick was stabbed four times. The State apparently contends that the infliction of multiple stab wounds made this offense especially heinous, cruel or depraved. That contention is not supported by the decision of the Supreme Court of Arizona in State v. Watson, 120 Ariz. 441, 586 P. 2d 1253 (1978). In Watson, the defendant shot the victim four times in the back, the last time while the victim was face down on the floor. Although the victim had been wounded

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several times, the Supreme Court ruled that the shooting was not "accomplished in such a manner as to set it apart from the norm of first degree murders...." 120 Ariz. at 448, 586 P. 2d at 1260. The Supreme Court acknowledged that the murder was "shocking," but concluded that:

> "We do not believe that the killing of the defendant was in a particularly heinous, cruel or depraved manner as contemplated by the statute and that aggravating factor number 6 of A.R.S. § 13-454 (E) was not shown." 120 Ariz. at 448, 586 P. 2d at 1260.

Unless the State contends that the Legislature intended to apply a different standard to killings committed with knives, it cannot be seriously argued that this murder was committed in an especially heinous, cruel or depraved manner.

Likewise, the other arguments made by the State do not support a finding that this was an especially heinous, cruel or depraved murder. The State has claimed that the killing was unnecessarily torturous to the victim because she was burned by the fire and she saw Defendant stab her daughters before she died. A clear preponderance of the evidence establishes that the fire did not contribute to the death of the victim. Dr. Louis Hirsch testified that he could find no physical evidence which suggested that the fire contributed to the death of the victim. Indeed, it was his conclusion that the stab wounds were the cause of death. While he indicated that it was possible that the victim was alive at the time of the fire, his testimony was clear that it was much more likely that Manuelita McCormick had died by the time the fire was started. Thus State v. Knapp, 114 Ariz. 531, 562 P. 2d 704 (1977), cited by the State, is factually and qualitatively different since in Knapp the undisputed cause of death was the fire.

The claim that the victim saw Defendant stab her daughters is also not supported by the weight of the evidence. Initial-

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ly, it is important to observe that on December 22, 1978, shortly after the incident occurred, Bernice McCormick told Detective Reuter that her sister Patricia "said don't hurt baby CHARLIE...." Statement of Bernice McCormick, December 2, 1978, at page 7, lines 22-23. Furthermore, the testimony suggests the following sequence of events: the children heard their mother scream; Bernice went to the area of the living room; there, Bernice saw her mother with the Defendant on top of her; after Bernice saw her mother, her mother didn't say a word; the Defendant told her to go back to her room; she returned to her room and played with clay; later, Defendant went to the bedroom area and asked that Patricia come to the living room; Bernice followed Patricia to the living room where they were stabbed. This sequence of events, together with the testimony of Dr. Hirsch indicates that Manuelita McCormick did not see the Defendant stab her daughters. She had died before they were stabbed. Therefore the killing of Manuelita McCormick was not especially heinous, cruel or depraved.

The State also contends that the Defendant should be executed because in the commission of the murder of Manuelita McCormick he "knowingly created a grave risk of death to another person or persons in addition to the victim of the offense." A.R.S. § 13-703 (F)(3). The State claims that this circumstance is proven because the Defendant has been found guilty of stabbing Patricia and Bernice and because all of the children were in the house when the fire was set. In advancing this argument, the State tacitly proposes what might be referred to as a "continuing transaction test." In other words, because the evidence shows that the act of killing preceded either the stabbing of the girls or the fire, the State is claiming that they were a part of the continuing transaction. However, the Supreme Court of Arizona rejected that ap-

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proach in State v. Ceja, 115 Ariz 413, 565 P. 2d 1274 (1977). In Ceja, the defendant murdered a husband and a wife. When he murdered the wife, or shortly thereafter, the husband drove to and entered the house. The defendant then shot and murdered the husband. The Supreme Court ruled that the trial court erred when it found that in the commission of the offense against the wife, the defendant knowingly created a grave risk to the husband. The Supreme Court explained:

> "... the evidence does seem to indicate that Randy did not drive up to the house until the appellant had dragged Linda into the bedroom and shot her again. At the least, it appears that Randy was still outside or in another room while the shooting was going on in the bedroom. Whichever version is correct, there was no evidence presented which tended to demonstrate that the appellant, in killing Linda, created a grave risk of death to Randy. Absent supportive evidence, we must hold that the court's finding of the existence of that aggravating circumstance was error." 115 Ariz. at 416, 565 P. 2d at 1277.

In short, the Supreme Court considered the acts related to the killing, not the continuing transactions. The Supreme Court of Arizona has rejected the approach advocated by the State.

Applying the test set forth in Ceja, in killing Manuelita McCormick, did the Defendant knowingly create a grave risk of death to another person? The answer must be no. There was no possibility of an errant bullet striking anyone. The only person who was or could have been injured in the stabbing of Manuelita McCormick was Manuelita McCormick.

Therefore, there are no aggravating circumstances which justify imposition of the death penalty. The Defendant should be sentenced to life imprisonment in accordance with A.R.S. § 13-703 (A).

RESPECTFULLY SUBMITTED this 3rd day of October, 1979.

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